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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CONTRACTORS BONDING AND )  
INSURANCE COMPANY, a )  
Washington corporation , )  
Plaintiff, )

v. )

AMERICAN LIGHTING )  
INDUSTRY, INC., a )  
California corporation )  
and DOES 1 through 10, )  
inclusive, )  
Defendants. )

Case No. EDCV 08-813-VAP  
(JWJx)

**[Motion filed on September  
5, 2008]**

**ORDER DENYING DEFENDANT  
ALI'S MOTION TO DISMISS**

Defendant ALI's Motion to Motion to Dismiss Under  
Rule 12(b)(3), (6) and (7) came before this Court for  
hearing on September 29, 2008. After reviewing and  
considering all papers filed in support of, and in  
opposition to, the Motion, as well as the arguments  
advanced by counsel at the hearing, the Court DENIES  
Defendant ALI's Motion to Dismiss Under Rule 12(b)(3),  
(6) and (7)

## **I. BACKGROUND**

### **A. Procedural History**

Plaintiff Contractors Bonding and Insurance Company filed a Complaint ("Compl.") against American Lighting Industry, Inc. and Does 1 through 10, inclusive ("Defendants") on June 17, 2008, alleging the following six claims: (1) breach of contract; (2) specific performance; (3) quia timet; (4) access to books, records and accounts; (5) violation of California's Uniform Fraudulent Transfers Act; and (6) declaratory relief.

On September 5, 2008 Defendant American Lighting Industry, Inc. ("ALI") filed a Motion to Dismiss Under Rule 12(b)(3), (6) and (7) ("Motion" or "Mot."). Plaintiff filed an Opposition ("Opp'n") on September 15, 2008.

### **B. Plaintiff's Allegations**

Plaintiff is a corporation engaged in the business of underwriting surety bonds. [Compl. ¶ 2.] Defendant ALI manufactures fixtures and furniture for public and private construction projects. [Id. ¶ 3.] A Cabinet Company, Inc. ("ACC") entered into a series of contracts with Pacific Monarch Resorts, Inc. ("PMR") to supply furniture, fixtures, equipment, and construction items for a construction project ("Project"), including two contracts ("Contracts") for ACC to provide specified

1 goods for the purchase price of \$300,478.00 and  
2 \$305,521.97, respectively, for the Project. [Id.] ACC  
3 purchased the goods for the Project from Defendant ALI.  
4 [Id. ¶¶ 6, 11.]

5  
6 As a condition of entering into the contracts with  
7 PMR, ACC posted surety bonds ("Bonds") issued by  
8 Plaintiff guaranteeing performance of the Contracts.  
9 [Id. ¶ 8.] Before the Bonds issued, ACC and Defendant  
10 ALI executed an indemnity agreement ("Indemnity  
11 Agreement"), under which ACC and Defendant ALI, agreed to  
12 indemnify all losses incurred by Plaintiff arising from  
13 the issuance of the Bonds. [Id. ¶ 10.]

14  
15 PMR has declared ACC to be in default under the  
16 Contracts resulting in claims against the Bonds and has  
17 sued Plaintiff to collect on its claims. [Id. ¶ 12.]  
18 Plaintiff alleges Defendant ALI has breached the  
19 Indemnity Agreement by failing to indemnify Plaintiff for  
20 the costs of defending against the lawsuit. [Id. ¶ 14.]  
21 As a result, Plaintiff has suffered damages in the nature  
22 of attorney's fees and expenses. [Id. ¶ 12.]

## 23 24 **II. LEGAL STANDARD**

### 25 **A. Federal Rule of Civil Procedure 12(b)(3)**

26 Federal Rule of Civil Procedure 12(b)(3) provides  
27 that a complaint may be dismissed for "improper venue."  
28

1 When deciding a motion to dismiss under Rule 12(b)(3),  
2 unlike a Rule 12(b)(6) motion, the Court need not accept  
3 the pleadings as true and may consider facts outside the  
4 pleadings. See R.A. Arqueta v. Banco Mexicano, S.A., 87  
5 F.3d 320, 324 (9th Cir. 1996). Once a defendant raises  
6 an objection to venue, the plaintiff bears the burden of  
7 establishing that the selected venue is proper. Rio  
8 Properties, Inc. v. Rio Intern. Interlink, 284 F.3d 1007,  
9 1019 (9th Cir. 2002). Plaintiff need only make a prima  
10 facie showing of proper venue to avoid the defendant's  
11 motion to dismiss. Id.

12  
13 When venue is improper, a party may either move to  
14 dismiss or transfer a case pursuant to 28 U.S.C. §  
15 1406(a), which provides: "The district court of a  
16 district in which is filed a case laying venue in the  
17 wrong division or district shall dismiss, or if it be in  
18 the interest of justice, transfer such case to any  
19 district or division in which it could have been  
20 brought."

21  
22 **B. Federal Rule of Civil Procedure 12(b)(6)**

23 Under Rule 12(b)(6), a party may bring a motion to  
24 dismiss for failure to state a claim upon which relief  
25 can be granted. As a general matter, the Federal Rules  
26 require only that a plaintiff provide "'a short and plain  
27 statement of the claim' that will give the defendant fair  
28

1 notice of what the plaintiff's claim is and the grounds  
2 upon which it rests." Conley v. Gibson, 355 U.S. 41, 47  
3 (1957) (quoting Fed. R. Civ. P. 8(a)(2)); Bell Atlantic  
4 Corp. v. Twombly, 550 U.S. \_\_\_, 127 S. Ct. 1955, 1964  
5 (2007). In addition, the Court must accept all material  
6 allegations in the complaint -- as well as any reasonable  
7 inferences to be drawn from them -- as true. See Doe v.  
8 United States, 419 F.3d 1058, 1062 (9th Cir. 2005); ARC  
9 Ecology v. U.S. Dep't of Air Force, 411 F.3d 1092, 1096  
10 (9th Cir. 2005).

11  
12 "While a complaint attacked by a Rule 12(b)(6)  
13 motion to dismiss does not need detailed factual  
14 allegations, a plaintiff's obligation to provide the  
15 'grounds' of his 'entitlement to relief' requires more  
16 than labels and conclusions, and a formulaic recitation  
17 of the elements of a cause of action will not do." Bell  
18 Atlantic, 127 S. Ct. at 1964-65 (citations omitted).  
19 Rather, the allegations in the complaint "must be enough  
20 to raise a right to relief above the speculative level."  
21 Id. at 1965.

22  
23 Although the scope of review is limited to the  
24 contents of the complaint, the Court may also consider  
25 exhibits submitted with the complaint, Hal Roach Studios,  
26 Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1555 n.19  
27 (9th Cir. 1990), and "take judicial notice of matters of  
28

1 public record outside the pleadings," Mir v. Little Co.  
2 of Mary Hosp., 844 F.2d 646, 649 (9th Cir. 1988).

3  
4 **C. Federal Rule of Civil Procedure 12(b)(7)**

5 A party may move to dismiss a case for failure to  
6 join an indispensable party under Federal Rule of Civil  
7 Procedure 19. Fed. R. Civ. P. 12(b)(7). A court should  
8 only grant a Rule 12(b)(7) motion if the court determines  
9 that joinder would destroy jurisdiction and the absent  
10 party is necessary and indispensable. See Shermoen v.  
11 United States, 982 F.2d 1312, 1317-18 (9th Cir. 1992). A  
12 Rule 12(b)(7) motion requires the moving party to bear  
13 the burden of producing evidence in support of the  
14 motion. See Citizen Band Potawatomi Indian Tribe of  
15 Okla. v. Collier, 17 F.3d 1292, 1293 (10th Cir. 1994).

16  
17 If it is not feasible to join a necessary party, the  
18 Court must determine whether the action "in equity and in  
19 good conscience" may proceed in the absence of that  
20 party, or whether it must be dismissed with "the absent  
21 party being thus regarded as indispensable." Fed. R.  
22 Civ. Proc. 19(b). Four factors listed in Rule 19(b) are  
23 to be considered in determining whether a Rule 12(b)(7)  
24 motion should be dismissed and the case proceed, or not.

25 ///

26 ///

27 ///

1 III. DISCUSSION

2 A. Defendant ALI Contends Venue is Improper Pursuant to  
3 Rule 12(b)(3)

4 Defendant ALI argues that pursuant to the Indemnity  
5 Agreement between it and Plaintiff, "[a]ny suit brought  
6 upon this agreement shall [be] brought in a court of  
7 competent jurisdiction in King County, Washington[.]"  
8 [Mot. at 8.] Therefore, Defendant ALI contends that  
9 venue is improper and Plaintiff's Complaint should be  
10 dismissed pursuant to Rule 12(b)(3). [Id. at 9.]

11 Plaintiff responds that the Indemnity Agreement clearly  
12 provides it "the right to waive the venue clause at its  
13 sole discretion." [Opp'n at 9.]

14  
15 The Indemnity Agreement contains the following  
16 provision regarding venue:

17 Any suit brought upon this agreement shall be  
18 brought in a court of competent jurisdiction in  
19 King County, Washington, and the undersigned  
20 consent to venue and personal jurisdiction in  
21 King County, for that purpose. This agreement  
22 is governed by the laws of the state of  
23 Washington. Surety shall have the right, in its  
24 sole discretion, to waive venue and/or  
25 jurisdiction in King County, Washington. Any  
26 waiver by Surety of the venue and/or

1 jurisdiction herein shall not waive the choice  
2 of law herein agreed to.

3 [Indemnity Agreement at 3, Exhibit B to Compl.]

4  
5 Federal law governs the validity and effect of forum  
6 selection clauses in diversity cases. Manetti-Farrow,  
7 Inc. v. Gucci America, Inc., 858 F.2d 509, 513 (9th Cir.  
8 1988). The venue provision here allows for Plaintiff at  
9 its sole discretion to choose a forum other than King  
10 County, Washington; thus, it is not a mandatory  
11 provision. Northern Cal. Dist. Council of Laborers v.  
12 Pittsburg-Des Moines Steel Co., 69 F.3d 1034, 1037 (9th  
13 Cir. 1995). Therefore, Defendant ALI's argument that  
14 King County, Washington is the sole proper venue for this  
15 action fails. Further, Defendant ALI's argument is  
16 inconsistent with its position that "[i]t is more logical  
17 and reasonable for this case to be transferred to Nevada  
18 as the Nevada Court is cognizant of the issues at hand  
19 and more apt to deal with the parties." [Mot. at 9.]

20  
21 Plaintiff need only make a prima facie showing of  
22 proper venue to avoid Defendant ALI's Rule 12(b)(3)  
23 Motion to Dismiss and it does so here. Rio Properties,  
24 Inc., 284 F.3d at 1019. In a diversity case, venue is  
25 proper in "(1) a judicial district where any defendant  
26 resides, if all defendants reside in the same State, (2)  
27 a judicial district in which a substantial part of the  
28



1 events or omissions giving rise to the claim occurred, or  
2 a substantial part of property that is the subject of the  
3 action is situated, or (3) a judicial district in which  
4 any defendant is subject to personal jurisdiction at the  
5 time the action is commenced, if there is no district in  
6 which the action may otherwise be brought." 28 U.S.C. §  
7 1391(a).

8  
9 Defendant ALI is a California corporation with its  
10 principal place of business in Riverside County,  
11 California. [Compl. ¶ 3.] For purposes of venue in a  
12 diversity case, "a defendant that is a corporation shall  
13 be deemed to reside in any judicial district in which it  
14 is subject to personal jurisdiction at the time the  
15 action is commenced." 28 U.S.C. § 1391(c). A  
16 corporation is a citizen and therefore subject to  
17 personal jurisdiction in both its state of incorporation  
18 and the state of its principal place of business. 28  
19 U.S.C. § 1332(a). Accordingly, the Court DENIES  
20 Defendant ALI's Motion to Dismiss under Rule 12(b)(3).  
21

22 **B. Defendant ALI Moves to Dismiss Plaintiff's Second**  
23 **Claim Under Rule 12(b)(6)**

24 Defendant ALI asserts that Plaintiff's second claim,  
25 entitled one for "specific performance," is "a remedy and  
26 not a cause of action[,"] thus, it should be dismissed  
27 pursuant to Rule 12(b)(6). [Mot. at 8.] Although  
28

1 specific performance is not an independent claim,  
2 Plaintiff also asserts breach of contract claim here.  
3 [Compl. ¶¶ 13-15.] Specific performance is a valid claim  
4 where a plaintiff alleges the following:

5 (1) A specifically enforceable type of  
6 contract, sufficiently certain in its terms.

7 (2) Adequate consideration, and a just and  
8 reasonable contract. (3) The plaintiff's  
9 performance, tender, or excuse for

10 nonperformance. (4) The defendant's breach.

11 (5) Inadequacy of the remedy at law.

12 5 Witkin, Cal. Proc., Pleading § 784, at 203-204 (5th ed.  
13 2008).<sup>1</sup> Plaintiff has sufficiently alleged the  
14 foregoing. [Compl. ¶¶ 16-21.]

15  
16 Accordingly, the Court DENIES Defendant ALI's Motion  
17 to Dismiss under Rule 12(b)(6).  
18

19 **C. Defendant ALI Contends Plaintiff has Failed to Join**  
20 **Indispensable Parties.**

21 Defendant ALI asserts that ACC, A-Mac Furniture  
22 ("AMF") and Sacon Industries are indispensable parties  
23

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24 <sup>1</sup> Neither party addresses the choice-of-law provision  
25 in the Indemnity Agreement which specifies that the  
26 agreement is "governed by the laws of the state of  
27 Washington." [Indemnity Agreement at 3, Exhibit B to  
28 Compl.] Since it is clear that Plaintiff has waived  
venue in Washington by filing in this District, the Court  
construes that Plaintiff has waived choice-of-law as  
well. Thus, the Indemnity Agreement shall be governed by  
California law.

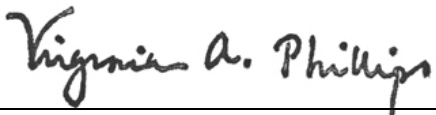
1 that must be joined in this case; otherwise they "may be  
2 subject to great prejudice, including inconsistent  
3 judgments and loss of their ability to present or defend  
4 potential claims." [Mot. at 6.] This argument is  
5 unpersuasive. AMF and Sacon Industries are not parties  
6 to the Indemnity Agreement; thus, they will not be  
7 affected by a judgment in this case.

8  
9 ACC is an indemnitor along with Defendant ALI under  
10 the Indemnity Agreement. [Indemnity Agreement at 4,  
11 Exhibit B to Compl.] The terms of the Indemnity  
12 Agreement, however, clearly state that the obligations of  
13 the indemnitors are joint and several. [Id. at 2.]  
14 Jointly and severally liable indemnitors are not  
15 indispensable parties under Federal Rule of Civil  
16 Procedure 19(b). Newman-Green, Inc. v. Alfonzo-Larrain,  
17 490 U.S. 826, 838 (1989).

#### 18 IV. CONCLUSION

19 For the foregoing reasons, the Court DENIES Defendant  
20 ALI's Motion.  
21  
22  
23

24 Dated: October 1, 2008

  
VIRGINIA A. PHILLIPS  
United States District Judge